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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA,
Petitioner,

v.

RON PAIR ENTERPRISES, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR UNITED REFINING COMPANY AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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BRIEF FOR UNITED REFINING COMPANY AS *AMICUS CURIAE* SUPPORTING RESPONDENT[1]

INTEREST OF THE *AMICUS CURIAE*

United Refining Company ("United") is a corporation which is presently operating pursuant to a Plan of Reorganization under Chapter 11 of the Bankruptcy Code, confirmed by the Bankruptcy Court in the Southern District of Texas, Case No. 87-03935-H2-5, Letter Decision dated Apr. 22, 1988. In so ruling, the court approved the reasoning of the court below in this case and that of the First Circuit in *In re Newbury Cafe, Inc.*, 841 F.2d 20. The government has appealed the Bankruptcy Court's decision to the district court. United therefore submits this brief *amicus curiae* with the consent of the other parties. This brief responds in the fullest detail that space permits to the argument of the United States in this Court. We thereby avoid duplicating the respondent's brief, which we were permitted to see in draft.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Bankruptcy Reform Act of 1978 (Pub. L. No. 95-598, 92 Stat. 2549) enacted a new Bankruptcy Code, Title 11 of the U.S. Code. This "comprehensive revision" (U.S. Br. 10) made important changes in the bankruptcy laws, and in other respects, codified existing law. The issue in this case is whether § 506(b) of the new Code changed prior law in order to allow postpetition interest on oversecured claims by holders of nonconsensual liens. To decide that issue, it is necessary first to understand how bankruptcy law dealt with postpetition interest before § 506(b) was enacted.

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[1] Throughout this brief, references to the opinion below will be to the Appendix to the Petition for Certiorari ("Pet."); references to the Brief for the United States in this Court will be cited "U.S. Br.".

Nicholas v. *United States*, 384 U.S. 678, 682, stated the general rule:

> It is a well-established principle of American bankruptcy law that in cases of ordinary bankruptcy, the accumulation of interest on claims against a bankrupt estate is suspended as of the date the petition in bankruptcy is filed. *Sexton* v. *Dreyfus*, 219 U.S. 339. That rule, grounded in historical considerations of equity and administrative convenience, was specifically made applicable to the accumulation of interest on claims for taxes by the decision of this Court in *New York* v. *Saper*, 336 U.S. 328.

This Court's decisions "reflect[ed] the broad equitable principle that creditors should not be disadvantaged *vis-a-vis* one another by legal delays attributable solely to the time-consuming procedures inherent in the administration of the bankruptcy laws." 384 U.S. at 683.

As of 1978, this rule was subject to three exceptions, of which the third is immediately pertinent here. Postpetition interest was allowed where the value of the collateral securing the debt was sufficient to pay both the claim and postpetition interest on that claim. As the court below explained, "where the creditor had bargained to become an oversecured creditor, he had an expectation of receiving interest were it necessary to sell the security." Pet. 7a. It was also well established, however, that the exception which allowed postpetition interest to be paid if the claim was oversecured did not apply to claims which were secured by *nonconsensual* liens because the reason underlying the exception did not apply. *Id.*

The general rule denying postpetition interest, and the first and second exceptions are codified in §§ 502(b)(2), 726(a)(5) and 552(b) of the new Code. Section 506(b) codifies the third exception—it unmistakably permits postpetition interest on oversecured claims where such interest is provided for under the agreement. But the government contends here that § 506(b) also *reversed* prior law by allowing postpetition interest also on claims of nonconsensual lienholders—a class which includes federal and state taxing authorities as well as private parties such as judicial and mechanic's lien claimants. In a carefully reasoned opinion, the Court of Appeals correctly rejected the government's position.

I. The government bases its interpretation of § 506(b) on what it repeatedly asserts is the "plain meaning" and "natural reading" of that provision. That "natural reading" rests on the view that the comma and conjunctive phrase ", and any" in § 506(b) separate the phrase "interest on such claim" from the remainder of the provision, "reasonable fees * * * provided for under the agreement under which such claim arose." U.S. Br. 15. This interpretation of ", and any" cannot be squared with the legislative history of § 506(b). An earlier version of that provision allowed to the holder of an oversecured claim *"to the extent collectible under applicable law* interest on such claim, and any reasonable fees, costs, or charges provided under the agreement * * *". H.R. 8200, 95th Cong., 1st Sess. (1977) (emphasis supplied). It is undisputed that the underscored phrase was intended to modify "fees", because its purpose was to subject claims for attorney fees to the limitations of state law. Thus, the comma and conjunction ", and any" did *not* separate the phrase "interest on such claim" from the remainder of the sentence. There is no basis for speculating that ", and any" was intended to assume this separating function when the underscored phrase relating to "applicable law" was eliminated; indeed in explaining the final bill, the managers from both Houses identified only a single change from § 506(b) of the House bill—they had adopted the Senate's view that claims for attorney fees should receive uniform treatment regardless of state law.

More generally, the government's contention that § 506(b) is unambiguous, although its "plain meaning"

rests in part on the presence of a comma, is untenable because this Court has long recognized the unreliability of punctuation in interpreting statutes, and has, where necessary, repunctuated the statute to arrive at the correct interpretation. *E.g.*, *Simpson* v. *United States*, 435 U.S. 6, 11-12 n.6; *United States* v. *Shreveport Grain & Elevator Co.*, 287 U.S. 77, 82-83; *Stephens* v. *Cherokee Nation*, 174 U.S. 445. The government's additional points relating to the text of the statute cannot justify the assertion that § 506(b) is *unambiguous*, since they provide, at most, a basis for *construing* that provision in the government's favor. On examination they fail to advance the government's case even to that limited extent.

II. In *Midlantic National Bank* v. *New Jersey Department of Environmental Protection*, 474 U.S. 494, this Court declared:

> The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific. (Citation omitted.) The Court has followed this rule with particular care in construing the scope of bankruptcy codifications. [474 U.S. at 501.]

This rule of construction was followed in *Kelly* v. *Robinson*, —— U.S. ——, 107 S.Ct. 353, 359-360 (Nov. 12, 1986), and once again in *United Savings* v. *Timbers of Inwood Forest*, 108 S. Ct. 626, 634 (Jan. 20, 1988).

The Court of Appeals followed these precepts in interpreting § 506(b) "as incorporating the third judicially created exception to disallowing postpetition interest on prepetition claims, including the limitations placed on that exception by the various circuit courts of appeals." Pet. 11a. The Court correctly reasoned that "the placement of a comma and the inclusion of the words 'and any' [which it deemed to be "ambiguous"] do not evince an intention to reject the well-established judicially created concept," and that the "admitted lack of legislative history on this point lends further credence to our position." *Id.* 11a-12a.

To accept the government's position, it must be assumed that Congress overrode the equitable considerations which were furthered by the prior law, without leaving a trace of evidence that it was dissatisfied with that law, and apparently wtihout prompting by any of the classes of creditors—public or private—who would be benefitted by the change. Significantly, the Commissioner of Internal Revenue made detailed proposals to Congress but did not urge that the law be revised to allow postpetition interest on federal tax claims or to nonconsensual lienholders generally.

The government attempts to limit the *Midlantic-Kelly* rule of construction to "the particular context of those cases", *viz.* "the question of the impact of a general bankruptcy provision on important issues and policies outside the bankruptcy context," which it seeks to contrast with cases where the "issue is a core bankruptcy matter." U.S. Br. 32. But the effort is in vain: The proffered distinction is contrary to the explicit reasoning in the *Midlantic* and *Kelly* opinions; fails to take account of *United Savings*, which followed *Kelly* in a "core bankruptcy matter"; and is inconsistent with the government's own position in its brief *amicus curiae* in *Midlantic*.

Finally, the government contends that Congress could not have intended to codify the prior law; in this regard, it points to changes in the lending practices of private creditors and to the Federal Tax Lien Act of 1966. As we explain, however, it is quite illogical to suppose that either of these events could have prompted Congress to make the sweeping change in the law for which the government contends—to allow holders of nonconsensual liens to receive postpetition interest. More fundamentally, even if it could be plausibly asserted that intervening events might have caused Congress to reverse the prior rule, the force of the *Midlantic-Kelly* rule of construction would not be overcome. For under that rule, an

intent to make such a change will not be attributed to Congress unless "it makes that intent specific". 474 U.S. at 501.

ARGUMENT

I. The Plain Terms of § 506(b) of the Bankruptcy Code Do Not Provide for Postpetition Interest to the Holders of Oversecured Claims in the Absence of an Agreement Providing for Such Interest.

A. Section 506(b) of the Bankruptcy Code ("Code") provides in pertinent part:

> To the extent that an allowed secured claim is secured by property the value of which * * * is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

The government asserts, and reiterates throughout its brief, that the "plain meaning" and "natural reading" of § 506(b) is that postpetition interest should be available to the holders of any oversecured claim, even if such interest is not provided for in an agreement between the debtor and the lienholder, although pre-Code law allowed such interest only where there was such an agreement. But as Judge Bailey Aldrich wrote in *In re Newbury Cafe, Inc.*,[2] where the same argument was made by the Massachusetts Department of Revenue ("DOR"):

> DOR goes so far as to tell us that the limitation-removal language is "clear and unambiguous." If anything seems clear, it is that that is not so. [841 F.2d at 22.]

In the words of the court below, the government's contention that "Congress intended to depart from pre-Code

[2] 841 F.2d 20 (C.A. 1), Pet. for Cert. pending, No. 87-1784, (hereafter *"Newbury Cafe"*). The Court there approved the Sixth Circuit's analysis in this case, saying that it "needs no elaboration". *Id.* at 22.

law with respect to only this one portion of section 506(b)" depends on "the ambiguous use of a comma and the words 'and any' ". Pet. 12a. The government's argument in this Court confirms that its "natural reading of the statute" depends on acceptance of the meaning which it attributes to ", and any":

> The authorization to pay interest on the claim appears designed to stand independently; it is separated from the remaining portion of the statute both by a comma and by the conjunctive phrase "and any." The comma and the conjunctive phrase together act to separate the phrase "interest on such claim" as one that can stand alone and to introduce a second category of payments allowed to the holders of oversecured claims, namely, "reasonable fees, costs, or charges provided for under the agreement under which such claim arose." [U.S. Br. 15.] [3]

This interpretation of ", and any" cannot be squared with the legislative history of § 506(b)—as we now demonstrate.

B. The fact that the drafters of § 506(b) did *not* intend ", and any" to have the meaning for which the government now contends is revealed by what the government would pass off as a "tidbit of legislative his-

[3] Since this proposed "natural reading" is based on the view that the "comma and the conjunctive phrase *together* act to separate * * *" (*id.*, emphasis added), it is entirely accurate to say that the government "is reduced to pinning its hopes on one, what one court has termed 'capricious,' comma". *Newbury Cafe*, 841 F.2d at 22, quoting *In re Dan-Ver Enters., Inc.*, 67 B.R. 951 (W.D.Pa. 1986). Only at the end of a long footnote which was an array of bankruptcy court decisions does the government acknowledge that the First Circuit "and a leading commentator * * * have taken the position that Section 506(b) codifies pre-Code law * * *". U.S. Br. 19-20, n.7, citing *Newbury Cafe*, and 3 *Collier on Bankruptcy* (L. King, 15th ed. 1988) ¶ 506.05 at 506-41 to 506-44 (hereafter "Collier").

tory". U.S. Br. 23-24, n.9.[4] As the government notes (*id.*), a dispute surfaced during the debate on § 506(b) as to whether claims for attorney fees should be limited by state law or should receive uniform treatment in bankruptcy regardless of state law. The bill originally reported by the House Ways and Means Committee took the former approach. In that version, § 506(b) read as follows:

> To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section is greater than the amount of such claim, there shall be allowed to the holder of such claim, *to the extent collectible under applicable law interest on such claim, and any* reasonable fees, costs, or charges provided under the agreement under which such claim arose. [H.R. 8200, 95th Cong., 1st Sess. (1977), emphasis supplied.][5]

[4] Elsewhere, the government asserts that "to the extent the legislative history bears on the matter at all, it generally supports the proposition that post-petition interest is available to all holders of oversecured claims." U.S. Br. 21. But the references which follow provide no such "support", and the government concludes the same paragraph by saying: "Thus, the legislative history does not bear directly upon the question of post-petition interest." *Id.* We agree with neither of these mutually contradictory statements. Rather, as we discuss in the text, the legislative history does provide evidence that the "grammatical structure" on which the government's "plain meaning" argument rests (*id.* 15) was *not* intended to have the effect which the government ascribes to it.

[5] We have set forth the language of the prior version exactly as it is reproduced in 12 Resnick & Wypyski, *Bankruptcy Reform Act of 1978—A Legislative History* (1979) at 387 (Doc. 41) (hereafter "Leg. Hist."), and in Volume 3 of the Appendix to the Collier treatise at 387. However, a comma appears between "applicable law" and "interest on such claim" at U.S. Br. 23, n.9; this is an accurate quotation from the body of that treatise, ¶ 506.03, at 506-8, but differs from the actual text of the bill.

While neither the presence nor absence of this particular comma would affect our discussion of the legislative history, this discrepancy vividly illustrates that "[t]he presence or absence of a comma, according to the whim of the printer or proof reader, is so nearly

If the drafters had intended by the use of ", and any" to separate the language which precedes that "comma and conjunctive phrase" from the remaining language in the sentence (U.S. Br. 15), § 506(b) of the House bill would not have accomplished its stated objective. For, if that were the effect of ", and any", the qualifying phrase "to the extent collectible under applicable law" would have modified only "interest on such claim". But that phrase was unquestionably intended also to modify "fees"; the legislative history leaves no doubt, and the government correctly states (*id.* 23-24, n.9), that the drafters of that bill sought thereby to limit claims for attorney fees to those permitted by state law.

This evidence from the legislative history compels the conclusion that the original drafters of § 506(b) did not consider it to be natural reading of the grammatical structure that ", and any" erects a wall separating "interest on such claim" from "any reasonable fees, costs, or charges provided for under the agreement under which such claim arose." The government's interpretation of § 506(b) therefore depends on the unspoken assumption that when the qualifying phrase ("to the extent that * * *") was dropped, the remaining ", and any" was intended to assume a separating function which it did not originally perform. There is no basis for surmising that Congress did any such thing; indeed, in explaining the final bill, the managers identified only a single change from § 506(b) of the House version—that dealing with attorney fees as described above. See 124 Cong. Rec. 32398 (1978) (statement of Rep. Edwards); 124 Cong. Rec. 33997 (1978) (statement of Sen. DeConcini).[6] Thus, the government's interpretation of § 506

fortuitous that it is a wholly unsafe aid to statutory interpretation." *Erie R. Co.* v. *United States*, 240 Fed. 28, 32 (C.C.A. 6). See also pp. 10-11, *infra*.

[6] The government proffers an entirely different lesson from the House Committee amendment. Noting that the qualifying phrase concerning "applicable law" was placed "*before* the language allowing interest", it argues that Congress' failure to have done like-

(b) is refuted by the legislative history.[7]

C. The specific history of § 506(b) aside, the government's contention that § 506(b) is unambiguous, although its proposed "plain meaning" rests in part on the presence of a comma, is untenable as a general proposition. And the difficulties with that argument are compounded because it depends not only on the *presence* of the comma after "interest on such claim", but also on the *absence* of a comma before the modifying clause "provided for under the agreement."[8] This Court has long recognized that "[p]unctuation is a most fallible standard by which to interpret a writing; it may be resorted to when all other means fail," *Ewing* v. *Burnet*, 11 Pet. (36 U.S.) 41, 53-54; *Northern Pacific Ry. Co.* v. *United States*, 227 U.S. 355, 360; *Barrett* v. *Van Pelt*, 268 U.S. 85, 91.[9] This Court's wariness about relying upon punctuation as a guide to legislative intent is anchored in the common experience that legislative draftsmen, like individuals generally, often punctuate incorrectly, through either oversight and ignorance. As Judge Aldrich observed in *Newbury Cafe*, *supra*,

> A comma, often a matter of personal style, is a very small hook on which to hang a change in the law of substantial proportions. [841 F.2d at 22.]

Accordingly, the Court has frequently repunctuated statutes in order to arrive at the correct interpretation. *E.g.*, *Simpson* v. *United States*, 435 U.S. 6, 11-12 n.6;[10] *United States* v. *Shreveport Grain & Elevator Co.*, 287 U.S. 77, 82-83, and cases cited *id.*; *Barrett* v. *Van Pelt*, *supra*.

Stephens v. *Cherokee Nation*, 174 U.S. 445 ("*Cherokee Nation*"), provides an especially apt illustration of this Court's practice because there is a striking similar-

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wise with the phrase "provided for under the agreement * * *" shows that that phrase was not intended to modify "interest on such claim". U.S. Br. 23-24, n.9, emphasis in original. That argument is at best an *inference* concerning legislative intent, far removed from the proposition on which the government's position depends—that the "plain meaning" of § 506(b) provides for post-petition interest to nonconsensual lienholders. The argument therefore cannot support the position that Congress intended to change the pre-Code law, since such an intent must be made "specific". *Midlantic*, *supra*, 474 U.S. at 501.

Moreover, the proposed inference from the *placement* of the qualifying phrase is entirely unwarranted. The government does not explain why, if Congress wishes to qualify language which appears in two phrases, it would more likely do so by inserting the limiting language *before*, rather than *after*, the phrases which are to be qualified, or show that this is in fact Congress' regular practice.

[7] See also pp. 18-20, *infra*, where we describe further evidence that § 506(b) was not intended to change existing law.

[8] The government observes that, if a comma appeared in § 506(b) before the qualifying phrase "provided for under the agreement", this would be evidence "that the legislature intended that it not be tied to the immediately preceding phrase, but instead should also qualify earlier antecedents" (U.S. Br. 17, n.4)—here, "interest on such claim."

[9] In *Barrett*, the Court said:

> The comma after the word "unloaded" *is not entitled to have any weight as evidence of the legislative intention* as against the considerations supporting the extension of the qualifying effect of the words "by carelessness or negligence" to all claims referred to in the second clause. [268 U.S. at 91, emphasis added.]

[10] In *Simpson*, the Court construed 18 U.S.C. § 2113(d), which provides aggravated penalties for any person who, in the course of committing or attempting to commit bank robbery,

> assaults any person, *or* puts in jeopardy the life of any person *by the use of a dangerous weapon or device* (emphasis added).

This Court held—despite the comma and conjunction (", or")—that

> ". . . In order to give lawful meaning to Congress' enactment of the aggravating elements in 18 U.S.C. § 2113(d), the phrase 'by the use of a dangerous weapon or device' must be read, regardless of punctuation, as modifying both the assault provision and the putting in jeopardy provision." [435 U.S. at 12, n.6, quoting with approval Judge McCree's separate opinion in *United States* v. *Beasley*, 438 F.2d 1279, 1284 (C.A. 6).]

ity between the statute construed there and § 506(b).[11] The statute at issue [12] provided as follows:

> Appeals shall be allowed from the United States courts in the Indian Territory direct to the Supreme Court of the United States to either party,[1] in all citizenship cases, *and* [2] in all cases between either of the Five Civilized Tribes and the United States *involving the constitutionality or validity of any legislation affecting citizenship, or the allotment of lands* * * * [174 U.S. at 479, emphasis and bracketed numbers added.]

The qualifying language emphasized above follows two sets of possible antecedents that are connected by a comma and the conjunction "and". The *Cherokee Nation* Court found this grammatical structure to be "somewhat obscure," and observed that the ambiguity could be removed entirely if the comma were *deleted* between antecedent [1] and antecedent [2], or a comma were *inserted* before the qualifying clause. 174 U.S. at 479-81. The Court held, on the basis of its understanding of the "mind of Congress" in enacting the statute, that the provision should be so repunctuated, thereby making clear that the qualifying language restricted *all* of the possible antecedents. *Id.* This is exactly the result reached by the Court of Appeals in this case in construing § 506(b).

D. In order to buttress its argument from punctuation, the government invokes "the doctrine of the last antecedent", which it would raise to the level of a dogma. U.S. Br. 16. The effort is self-defeating, however, because a rule of *construction* does not reveal the "plain meaning" of statutory language.[13] As the treatise cited

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[11] See also *Simpson*, discussed at p. 11, n.10, *supra*, and *Mor*, discussed at pp. 13-14, *infra*.

[12] Indian Appropriation Act of July 1, 1898, c. 545, 30 Stat. 571, 591.

[13] In the context of § 506(b), the doctrine that "* * * qualifying words, phrases, and clauses are to be applied to the *words or*

by the government on this point cautions, this "rule" is merely "*another aid* to discovery of intent or meaning and is not inflexible and uniformly binding." [14] The fact is that courts often conclude that a word or phrase qualifies words other than its immediate antecedent. This is so for the elementary reason that "a clause modifies that antecedent which the draftsman intended it to modify," regardless whether that antecedent is immediate or distant. *United States* v. *Brandenburg*, 144 F.2d 656, 660-61 (C.A. 3). Accordingly, a counterprinciple to the "last antecedent" rule was recognized in *Porto Rico Ry., Light & Power Co.* v. *Mor*, 253 U.S. 345 ("*Mor*"). Justice Brandeis explained:

> When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all. [253 U.S. at 348.]

At issue in *Mor* was a jurisdictional provision [15] providing in relevant part:

> Said district court shall have jurisdiction of all controversies where all of the parties * * * are [1] citizens or subjects of a foreign State or States, *or* [2] citizens of a State, Territory, or District of the United States *not domiciled in Porto Rico*, wherein the matter in dispute exceeds, exclusive of interest or cost, the sum or value of $3,000 * * *. [*Id.* at 346, emphasis and bracketed numbers added.]

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phrase immediately preceding" (*id.*, emphasis added) leads to two possible results: The qualifying phrase "provided for under the agreement * * *" could be applied either to the immediately preceding *word*—"charges", or to the *phrase* "any reasonable fees, costs, or charges". The former alternative, for which no one contends, is excluded only for reasons extrinsic to the "doctrine".

[14] 2A C. Sands, *Sutherland Statutory Construction* § 47.33 at 245 (4th ed. 1984) (emphasis supplied), cited at U.S. Br. 16.

[15] Section 41 of the Jones Act, March 2, 1917, c. 145, 39 Stat. 951, 965.

The qualifying language construed in *Mor* ("not domiciled in Porto Rico") follows two groupings of possible antecedents *that are connected by a comma and a conjunction.* This language, too, parallels that of § 506(b). The Court held in *Mor*, as it had in *Cherokee Nation*, that the "natural construction" of the language of the statute in question required that the qualifying language modify all antecedents. 253 U.S. at 348. This was deemed to be the natural reading in both cases even though no comma appeared *before* the qualifying phrase—as the government suggests is required, p. 10, n.8, *supra.*

Under the *Mor* approach, the "natural construction" of the parallel language of § 506(b) limits "interest on such claim" to situations where interest is "provided for under the agreement under which such claim arose." But even if this is not the "natural construction," the Court's analysis in *Mor* and *Cherokee Nation* removes any basis for the government's contention that the text of § 506(b) *unambiguously* disallows it.[16]

[16] The government makes two additional arguments which likewise contribute no insight into the "plain meaning" of § 506(b) but, at most, proposed possible *inferences* concerning Congressional intent. U.S. Br. 17-19. Both points are specious.

The government asserts that if it had intended to allow postpetition interest only for consensual liens, "Congress likely would have placed the provision elsewhere", *id.* 18; but no more appropriate placement for the provision is proffered. Moreover, even under the government's proposed construction—that interest is allowed also for nonconsensual liens—the provision would apply only to *oversecured* claims and, therefore, would be equally subject to the objection that "the context in which Section 506(b) appears hardly indicates that the entire subsection was designed to be limited to a particular type of secured claim." *Id.* 17. And since § 506 "concerns the treatment of secured claims in bankruptcy proceedings" (*id.* 3), the placement of the provision in that section is unremarkable. Similarly, since § 506(b) deals with *claims* rather than "lien[s] created by an agreement", the language chosen by Congress is at least as appropriate (we need put it no higher) as some revision which would use the term "security interest", as the government suggests. *Id.* 18.

[Continued]

II. The Court of Appeals Correctly Concluded That Congress Did Not Change the Well-Settled Principle Which Denies Postpetition Interest on Prepetition Claims Secured by Nonconsensual Liens.

A. In *Nicholas* v. *United States*, 384 U.S. 678, Justice Stewart stated and explained the general bankruptcy principle which in 1978, when the Bankruptcy Code was enacted, governed postpetition interest on prepetition claims:

> It is a well-settled principle of American bankruptcy law that in cases of ordinary bankruptcy, the accumulation of interest on claims against a bankrupt estate is suspended as of the date the petition in bankruptcy is filed. *Sexton* v. *Dreyfus*, 219 U.S. 339. That rule, grounded in historical considerations of equity and administrative convenience, was specifically made applicable to the accumulation of interest on claims for taxes by the decision of this Court in *New York* v. *Saper*, 336 U.S. 328.
>
> * * * *
>
> We believe that the decisions of this Court in *Sexton* and *Saper* reflect the broad equitable principle that creditors should not be disadvantaged *vis-a-vis* one another by legal delays attributable solely to the time-consuming procedures inherent in the administration of the bankruptcy laws. In the context of interest-bearing debts, the equitable principle enunciated in *Sexton* and *Saper* rests at bottom on an awareness of the inequity that would result if, through the continuing accumulation of interest in the course of subsequent bankruptcy proceedings, obligations bearing relatively high rates of interest

[16] [Continued]

To be sure, if Congress had anticipated the argument that § 506(b) allows nonconsensual lienholders to receive postpetition interest—although no such result was urged during consideration of the bills, see pp. 19-20, *infra*—it might have used different words or different punctuation. Even so, the drafters would have had no assurance that they had avoided ambiguity or excluded all argument that its intent would have been more clearly expressed by some other formulation.

> were permitted to absorb the assets of a bankrupt estate whose funds were already inadequate to pay the principal of the debts owed by the estate. [384 U.S. at 682-684, footnotes omitted.]

See also *Vanston Bondholders Protective Committee* v. *Green*, 329 U.S. 156, 163-164 (*"Vanston Committee"*); *United Savings* v. *Timbers of Inwood Forest*, 108 S.Ct. 626, 631 (Jan. 20, 1988) (*"United Savings"*), quoted at p. 18, n.19, *infra*; and the decision below, Pet. 5a-6a.

As of 1978, this general rule was subject to three exceptions whereby postpetition interest on prepetition secured claims was allowed if: (1) the debtor is proven to be solvent; (2) the property held by the creditor to secure the debt produces income during the course of proceedings; or (3) the value of the collateral securing the debt is sufficient to pay both the claim and postpetition interest on the claim. The first two exceptions had long been recognized under English bankruptcy law and were approved by this Court; see *New York* v. *Saper*, 336 U.S. at 330, n.7, citing *American Iron Co.* v. *Seaboard Air Line*, 233 U.S. 261, 267; *Sexton* v. *Dreyfus*, 219 U.S. at 346. The third exception had been generally widely approved by the Courts of Appeals.[17] This third exception

> was created pursuant to the theory that postpetition interest should be allowed where a security agreement had been voluntarily executed and the creditor had successfully bargained for specific, valuable collateral to secure the principal obligation. Accordingly, where the creditor had bargained to become an oversecured creditor, he had an expectation of

[17] See *e.g.*, *Kagan* v. *Industrial Washing Machine Corp.*, 182 F.2d 139, 146 (C.A. 1); *Eddy* v. *Prudence Bonds Corp.*, 165 F.2d 157, 160 (C.A. 2, L. Hand, J.); *Oppenheimer* v. *Oldham*, 178 F.2d 386 (C.A. 5); *In re Macomb Trailer Coach*, 200 F.2d 611, 613 (C.A. 6); *In re Kerber Packing Co.*, 276 F.2d 245 (C.A. 7); *In re Black Ranches, Inc.*, 362 F.2d 8, 15 (C.A. 8); *United States* v. *Bass*, 271 F.2d 129, 130 (C.A. 9); *In re Deep Rock Oil Corp.*, 113 F.2d 266, 269 (C.A. 10). See also *Vanston Committee*, *supra*, 329 U.S. at 164 (*dictum*).

> receiving interest were it necessary to sell the security. [Pet. 6a-7a.]

However, as the court below also explained:

> It was equally well established by at least four courts of appeals that the third exception—allowing the payment of postpetition interest if the claim was oversecured—did not apply to liens which were nonconsensual in nature, such as tax liens, *because the underlying reason for the exception did not apply.* [Pet. 7a, emphasis added.] [18]

The general principle disallowing postpetition interest is expressly codified in § 502(b)(2), and the first and sec-

[18] The court below cited *In re Kerber Packing Co.*, 276 F.2d 245 (C.A. 7); *United States* v. *Mighell*, 273 F.2d 682, 684 (C.A. 10); *United States* v. *Bass*, 271 F.2d 129 (C.A. 9); *United States* v. *Harrington*, 269 F.2d 719, 724 (C.A. 4).

While acknowledging that the courts had established the principles described in the text, the government objects that *Harrington* "does not truly endorse the distinction between consensual and nonconsensual liens * * *". U.S. Br. 25, n.10. It is true that the *Harrington* court did "not find in the decided cases sufficient support for a third general exception." 269 F.2d at 723. But that court observed that the cases recognized an exception "for mortgagees or holders of other particular collateral" and squarely embraced the distinction between nonconsensual and consensual liens. *Id.* at 724, quoted at p. 26, *infra*. Most to the point, the government cannot deny that *Harrington* refused to allow postpetition interest even where the government has obtained tax liens. *Id.* at 721-722, 724. And *that* is the rule which the government seeks to reverse in this case. See pp. 26-27, *infra*.

The government's criticism of the Court of Appeals' citation of *Mighell* (U.S. Br. 26, n.10) is likewise unwarranted. The Tenth Circuit there expressly rejected the government's contention that *New York* v. *Saper*, *supra*, should be distinguished "on the basis that [in *Mighell*] there was a pre-bankruptcy lien." 273 F.2d at 684. Thus, the court did not, as perhaps it might have, decide *Mighell* solely on the ground that the government had not there relied on any of the three exceptions; instead, the court went further and "agree[d] with" the reasoning of *Harrington* and *Bass*, *supra*, that the presence of tax liens does not justify granting postpetition interest on a tax claim. *Id.*

ond exceptions "were preserved intact" in §§ 726(a)(5) and 552(b) respectively. See *Newbury Cafe*, 841 F.2d at 22. And it is common ground that § 506(b) codifies the third exception as it was applied by the courts to allow postpetition interest to oversecured consensual creditors.[19]

Thus, the only open issue is whether Congress, in that provision, at the same time *changed* the law to allow postpetition interest on oversecured claims where the lien is nonconsensual in origin, although such interest had consistently been disallowed by the courts. Such a change would be sweeping, for it would allow postpetition interest to all holders of oversecured claims—to private nonconsensual lienholders such as judgment creditors and mechanic's lien claimants as well as state and federal revenue collectors. See U.S. Br. 19 and cases cited at *id.* n.7. In order to accept the government's position it must be assumed that Congress overrode the equitable considerations which underlie *Sexton*, *Saper* and *Nicholas* on behalf of these categories of claimants without leaving a trace of evidence that it was dissatisfied with existing law. Indeed, for aught that appears, no group which would benefit from such a reversal proposed that it be accomplished. Significantly, the Commissioner of Inter-

[19] Section 506(b) also implicitly reaffirms the general principle, because to the extent that it permits interest it does so only with respect to certain *oversecured* claims. This Court said in *United Savings*:

> Section 506(b)'s denial of postpetition interest to undersecured creditors merely codified pre-Code bankruptcy law, in which that denial was part of the conscious allocation of reorganization benefits and losses between undersecured and unsecured creditors. "To allow a secured creditor interest where his security was worth less than the value of his debt was thought to be inequitable to unsecured creditors." *Vanston Bondholders Protective Committee* v. *Green*, 329 U.S. 156, 164 (1946). It was considered unfair to allow an undersecured creditor to recover interest from the estate's unencumbered assets before unsecured creditors had recovered any principal. [108 S.Ct. at 631.]

nal Revenue, in extensive comments on the tax aspect of earlier versions, made specific proposals as to what bankruptcy reform legislation should contain, but did not urge that the bills should be revised to allow postpetition interest on federal tax claims, or on claims of nonconsensual lienholders generally.[20]

That Congress did not intend to change existing law in enacting § 506(b) is evidenced also by an important item of legislative history which apparently was not cited to the court below. A "Table of derivation of H.R. 8200" prepared by the House subcommittee states, with respect to § 506(b), that the "Present law" is "*In Re Black Ranches, Inc.* [362 F.2d 8, see p. 16, n.17, *supra.*]"[21] This is a reference to a 1966 Eighth Circuit decision which allowed postpetition interest to an oversecured creditor where the agreement—a note—provided for such interest. On the other hand, where a provision created "New" law, the table so states; so too, where a provision of the

[20] Commissioner Donald C. Alexander submitted identical statements to the House and Senate Committees commenting on bills which were before the 94th Congress; see 6 Leg. Hist. 1943 (Doc. 30), and 11 *id.* at 12 (Doc. 37). None of these bills contained a provision relating to postpetition interest for oversecured creditors, and Mr. Alexander did not recommend that such a provision be included to change the existing law. Indeed, he cited *Nicholas*, *supra*, without apparent disapproval; in this regard, he urged legislation only to deny a tax deduction for unpaid interest to taxpayers who are on an accrual basis:

> The filing of a petition in a chapter [XI] or liquidating proceeding suspends the accumulation of interest on pre-petition debts for purposes of distribution. *Nicholas* v. *United States*, 384 U.S. 678 (1966). However, interest continues to accrue for tax purposes on secured debts even though it is obvious that it will not be paid. Rev. Rul. 70-367, 1970-2 C.B. 37. Although the Service is presently reconsidering Rev. Rul. 70-367 it would nevertheless be desirable to have legislation to the effect that no deduction shall be allowed with respect to interest which accrues during a bankruptcy proceeding on pre-petition debts unless and until such interest is actually paid. [6 Leg. Hist. at 1987-88; 11 *id.* at 49.]

[21] 11 Leg. Hist. (Doc. 40) at 8.

prior Bankruptcy Act was revised, the table says, "Compare with * * * " (citing the pertinent section or sections of the prior Act).[22]

B. Against the background of these well-established principles of bankruptcy law, the question whether § 506(b) is to be construed to allow the government and other nonconsensual lienholders to receive postpetition interest is governed by the rule of construction set forth in *Midlantic National Bank* v. *New Jersey Department of Environmental Protection*, 474 U.S. 494 (*"Midlantic"*):

> * * * [W]hen Congress enacted § 554 [of the Bankruptcy Code], there were well-recognized restrictions on a trustee's abandonment power. In codifying the judicially developed rule of abandonment, Congress also presumably included the established corollary that a trustee could not exercise his abandonment power in violation of certain state and federal laws. The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific. *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 266-267 (1979). *The Court has followed this rule with particular care in construing the scope of bankruptcy codifications.* [474 U.S. at 501, emphasis added.]

This rule of construction was followed, and *Midlantic* quoted with approval, in *Kelly* v. *Robinson*, —— U.S. ——, 107 S.Ct. 353, 359-360 (Nov. 12, 1986). It was followed once again last Term in *United Savings*, where the Court reaffirmed that "* * * a major change in the existing rules would not likely have been made without specific provision in the text of the statute, cf. *Kelly* v. *Robinson*, 479 U.S. ——, —— (1987); it is most improbable that it would have been made without even any mention in the legislative history." 108 S.Ct. at 634.

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[22] 11 Leg. Hist. (Doc. 40) *passim*.

The court below correctly understood that *Midlantic* and *Kelly require* that "in order to determine if section 506(b) changed the interpretation of a judicially created rule, we must first understand that rule and its origins." Pet. 5a. Having reviewed the pre-1978 decisions, that court correctly held "that the language of section 506(b), when read in light of the pre-Code judicially created doctrine, codifies the pre-Code law on the issue of allowable postpetition interest." *Id.* 10a.[23]

C. The government asserts, however, that the court below erred in its reliance on *Midlantic* and *Kelly*. U.S. Br. 30-35. In so doing, it misreads first, the opinion below and, more seriously, this Court's decisions in *Midlantic* and *Kelly*.

(1) Contrary to the government's characterization, the court below did not say that *Midlantic* and *Kelly* "establish a general rule requiring explicit statements in the legislative history to enact a new bankruptcy provision that deviates from pre-Code law." U.S. Br. 31. What the Court of Appeals actually said in the passage to which the government there refers is:

> If Congress intended to depart from pre-Code law with respect to only this one portion of section 506(b), particularly when several courts of appeals were unanimous in their interpretation of the Bankruptcy Act, such an intent must be expressed explicitly and not through the ambiguous use of a comma and the words "and any." [Pet. 12a.]

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[23] See also *id.* 12a, quoted in text, this page, and *Newbury Cafe*, *supra*: "In light of the uniform and extensive pre-Code law, [the] void [in the legislative history] is a serious obstacle for [the State Revenue Authority], particularly in a bankruptcy matter." 841 F.2d at 22, quoting *Midlantic*, and approving the reasoning of the court below. We note also that the Fourth Circuit in *In re Best Repair Co.*, 789 F.2d 1080, did not attempt to reconcile its conclusion with the *Midlantic* rule of construction. It may be that *Midlantic* was not called to the Fourth Circuit's attention; that case was decided only 10 days before the argument in *Best Repair*; *Kelly* and *United Savings* were decided *after Best Repair*.

The proposition that any intent to change the pre-Code law "must be expressed explicitly" is an entirely accurate statement of the *Midlantic-Kelly* rule of construction. Of course, Congress can express such an intent "explicitly" without resort to legislative history; it can do so "on the face of a statute". U.S. Br. 31-32, citation omitted. The court below said nothing to the contrary. Rather, it determined that the language and punctuation of § 506(b) are "ambiguous," so that the intent to change does *not* appear "on the face of [the] statute". Accordingly, the Court of Appeals concluded that the "admitted lack of legislative history on this point lends further credence to [its] position." Pet. 11a-12a.[24]

(2) The government attempts to limit *Midlantic* and *Kelly* to "the particular context of those cases", *viz.* "the question of the impact of a general bankruptcy provision on important issues and policies outside the bankruptcy context," which it seeks to contrast with cases where the "issue is a core bankruptcy matter." U.S. Br. 32. See also *id.* 34-35. The government's proffered distinction

[24] In charging that the Court of Appeals "characterized the final statements on the floor of the House and Senate by the managers of the legislation as addressed to the differences between the language of the House and Senate *Reports*" (U.S. Br. 32, n.14, emphasis in original), the government misreads that Court's opinion. The sentence which the brief criticizes, but does not quote, is: "The statements of the committee chairmen only explain why the reference to the attorney's fees was eliminated." Pet. 12a, n.11. These words plainly do not refer to the committee *Reports*. If it is necessary to go further, the context, too, refutes the government's reading. The opening (topic) sentence of the Court's footnote is: "The Senate Report, the House Report, and statements of the chairmen on the responsible subcommittees do not address the language in section 506(b) referring to interest." *Id.* In the remainder of the footnote, the Court described first, what the House and Senate Reports said about the substance of § 506(b), and then (in the above-quoted sentence) the statements of the committee chairmen on the same subject.

In short, the accusation that the court below was "excessively preoccup[ied] with the legislative history" (U.S. Br. 32, n.14) is not merely hypercritical; it is wrong. Cf. *Matthew* 7:3.

is contrary to the reasoning in the *Midlantic* and *Kelly* opinions; fails to take account of *United Savings*, which followed *Kelly* in "a core bankruptcy matter"; and is inconsistent with the government's own position in *Midlantic* itself.

a. The major infirmity of the government's attempt to distinguish *Midlantic* and *Kelly* is that this Court's opinions do not permit the proposed limitation. The Court declared that the "*normal rule of statutory construction* is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific" (citing a case from another field), and then stated that the "Court has followed this rule *with particular care in construing the scope of bankruptcy codifications.*" *Midlantic*, 474 U.S. at 501, and *Kelly*, 107 S.Ct. at 359, emphasis added. This statement that the rule is applicable to legislation generally and with special force to bankruptcy issues, simply will not bear the government's suggested reading that the rule is confined to a particular class of bankruptcy issues. The government's brief does not quote, let alone discuss, the critical portion of the *Midlantic* and *Kelly* opinions which states the rationale which the Court of Appeals followed in this case.[25]

b. The government's attempt to limit the *Midlantic-Kelly* rule of construction to "the particular context of those cases" perforce ignores the fact that that rule was followed also in *United Savings*, 108 S.Ct. at 634, quoted at p. 20, *supra*. The issue in *United Savings* was whether an undersecured creditor is entitled to interest on its collateral during the automatic stay provided by § 362(a) of the Code. The case involved the construction primarily of §§ 361, 362(d) and 506(b) of the Code; it had nothing to do with the relationship between the Code and "policies outside the bankruptcy context." U.S. Br. 32.

[25] This omission is all the more revealing since the government quotes liberally from *other* portions of the *Midlantic* and *Kelly* opinions. U.S. Br. 33-35.

In the government's terms, *United Savings* was "a core bankruptcy matter." *Id.*

c. The government's contention in this case that the rule of construction has only a narrow scope is also contrary to its own submission in *Midlantic*. There, the government asserted, without qualification:

> Congress is, of course, presumed to have codified the judge-made law existing at the time of its consideration and enactment of Section 554. See *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 379-382 (1982); *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978). At the time that Congress considered and enacted Section 554, the trustee's responsibility to exercise his abandonment powers consistent with federal and state police powers was well established.[26]

As the government said, "of course." This rule of construction not only states established precedent but makes eminently good sense. Were it otherwise, every previously decided question of bankruptcy law would become *res nova* whenever Congress engages in a "comprehensive revision of the Nation's bankruptcy laws". U.S. Br. 10. The same would be true with respect to "comprehensive revisions" in other areas of the law. The result would be chaos for the courts, to say nothing of affected parties. Moreover, Congress knows what changes it wants to make, sweeping though they may be, and the inference that it wishes to preserve that which it leaves alone is compelling; indeed, new provisions are normally drafted on the assumption that they will fit into an existing legal framework.

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[26] Brief for the United States as *Amicus Curiae* Supporting Respondents, Nos. 84-801 and 84-805, p. 16. See also *id.* at 15:

> * * * Congress's failure to elaborate on the reach of Section 554 "is most eloquent, for such reticence while contemplating an important and controversial change in existing law is unlikely." *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 266-267 (1979) (footnote omitted).

D. The government contends also that Congress could not have intended to codify the principles of the pre-1978 cases. U.S. Br. 26-30. These contentions are uniformly without merit, as we now show.

(1) The government says that "it is something of an exaggeration to characterize [the pre-1978 decisions] as establishing a 'rule' that could appropriately be codified." U.S. Br. 26. We certainly agree that, as a general matter, " 'the touchstone of each decision on allowance of interest in bankruptcy * * * has been a balance of equities between creditor and creditor or between creditors and the debtor' ". *Id.*, quoting *Vanston Committee*, *supra*, 329 U.S. at 165. But whereas the courts sometimes *denied* postpetition interest to a consensual lienholder in light of special circumstances,[27] discretion was not exercised to *grant* such interest to nonconsensual lienholders. Moreover, any suggestion that these equitable principles *could not be codified* defies the reality of what Congress *did* in § 506(b) itself and in the other provisions cited at pp. 17-18, *supra*.

(2) Pointing to "changes in commercial lending practices and in the law governing federal tax liens", the government argues that "to the extent Congress focused its attention at all on the[e] pre-Code distinction [between consensual and nonconsensual liens], it would be expected to have regarded it as a prime candidate for revision, not codification". U.S. Br. 26. Of course, if Congress did *not* "focus[] its attention at all on this pre-Code distinction," the *Midlantic-Kelly* rule of construction compels the conclusion that *no* change in the prior law was intended. Moreover, the force of that rule

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[27] *E.g.*, *In re Magnus Harmonica Corp.*, 262 F.2d 515, 518 (C.A. 3). There, while the claim for interest was within the contract, the secured creditor had made "overcharges against the debtor outside the terms of the contract and it is only because the debtor is precluded from complaining that the trustee is bound by the debtor's inaction." Therefore, "[s]uch equities as [were] apparent favor[ed] the trustee acting for the general creditors as against [the secured creditor]." *Id.*

is not overcome by showing that intervening circumstances *might have* caused Congress to change the prior bankruptcy law. Thus, the entire enterprise at U.S. Br. 26-30 is fundamentally flawed. Moreover, when the changes to which the government points are examined more closely, it is apparent that neither would have provided any reason for Congress to allow postpetition interest to holders of nonconsensual liens.

a. The government's argument builds on the rationale of the pre-Code decisions, which are fairly exemplified by the following paragraph from *United States* v. *Harrington*, cited at U.S. Br. 27 and 28. The court there said:

> The justification for this allowance to mortgagees, etc., would seem to be that when the creditor extended credit, he relied upon the particular security given as collateral to secure both the principal of the debt and interest until payment and, if the collateral is sufficient to pay him, the contract between the parties ought not be abrogated by bankruptcy. This rationale has no application to tax liens. [269 F.2d at 724.]

We begin by underscoring the obvious. The first quoted sentence set forth the reasons why the courts had recognized an exception allowing postpetition interest to oversecured consensual lienholders; the second sentence stated that nonconsensual liens did not come within this rationale and, therefore, were not subject to an exception from the general rule. Thus, *Harrington* makes clear—and this is likewise true of the other cases that state the pre-Code rule—that the "distinction between consensual and nonconsensual liens" was established by a *two-step* process: (1) Certain characteristics of oversecured loans where interest is provided for in the agreement between the borrower and the lender warrant recognition, on behalf of consensual creditors, of a third exception to the general rule that postpetition interest will not be allowed; (2) this rationale is not applicable to tax and other nonconsensual liens, and *therefore* no exception from the

general rule is to be made with respect to claims secured by such liens.[28]

Thus, in seeking to divert analysis to the "distinction between nonconsensual and consensual liens" (U.S. Br. 24-30), the government approaches the issue and the pre-1978 cases from the wrong end. Those decisions began from the "well-settled" principle that postpetition interest is not allowed. To this principle three exceptions were recognized—one in favor of oversecured consensual lienholders. The government's attempt to bring tax liens within the latter exception failed because the rationale for that exception has no application to tax and other nonconsensual liens. A change in practice which "almost completely undermined" that rationale (*id.* 26) might have prompted Congress to repudiate the exception to oversecured consensual lienholders and, *in that way*, to eliminate the "distinction between nonconsensual and consensual liens" (*id.*), but it is wholly illogical to contend, as the government urges, that such a change could in some way have caused Congress to grant an exception for nonconsensual lienholders.

b. Turning specifically to the government's reliance on "changes in commercial lending practices" (*id.*), the heart of the matter is this: It was no part of the courts' rationale for disallowing interest on claims secured by *non-*

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[28] As stated in *Kerber Packing Co.*:

> The broad language of the *Saper* case appears to deny post-bankruptcy interest on all tax claims. We do not believe that the Supreme Court intended the application of the principles set out therein to be restricted to non-liened taxes.
>
> In three recent decisions, * * * the United States contended for post-bankruptcy interest on liened tax claims. Each of these courts rejected the post-bankruptcy interest on liened tax claims. We agree with those decisions.
>
> The application of the exceptions to the allowance of interest on claims subsequent to filing of a petition in bankruptcy or other insolvency proceedings should not be extended by judicial fiat. [276 F.2d at 247-248, citations omitted.]

consensual liens that "a lien held by a private *consensual* creditor typically attached to a single asset". U.S. Br. 27, emphasis added. Rather, that disallowance was based on the equitable considerations articulated by this Court in *Sexton*, *Saper* and *Nicholas*. See p. 15, *supra*. Indeed, the government concedes that the courts' view was that "in the absence of such a bargain [for interest], it would be inequitable to award interest at the expense of the unsecured creditors." U.S. Br. 28. These competing equities between unsecured creditors and creditors holding *nonconsensual* liens could not be affected in the slightest by a new lending practice of *consensual* lienholders "to secure their loans by obtaining a lien on virtually every asset owned by the debtor". *Id.* 27. Since the change on which the government relies does not pertain even remotely to the "reasons given in the pre-Code cases" (*id.*) *for denying interest on nonconsensual liens*, the government is entirely unjustified in speculating that the 1978 Congress was prompted by that change to reverse the prior law and allow postpetition interest on such liens.

Conversely, since the courts relied on the prior practice —if at all—only as a reason for allowing postpetition interest to oversecured creditors holding *consensual* liens, a change in the practices of such creditors could, at most, have induced Congress to deny interest to holders of consensual liens generally (or to those who attached more than a single asset). Congress instead chose to codify that exception, perhaps because it believed, as had the courts, that it is desirable to give private creditors the benefit of their bargain for interest.[29] In any event, since the change in practice affected, at most, the rationale for allowing

[29] For aught that appears, Congress was advertent only to changes in the practices of creditors lending money to *consumer* debtors, for these alone were referred to in the House Report cited at U.S. Br. 27. Congress addressed that matter *directly* by enabling individual debtors to avoid liens on certain personal property, including household goods, as specified in § 522(f)(2) of the Code, cited *id.* at n.11.

interest secured by *consensual* liens (where the underlying agreement provided for interest), it is wholly illogical to argue from that change that Congress altered the law with respect to *nonconsensual* liens, such as those for taxes, or on judgments.

c. The further point—based on a supposed shift in the balance of equities between private and nonprivate secured creditors due to the Federal Tax Lien Act of 1966, which makes it more probable that private creditors will receive notice of federal tax liens (U.S. Br. 28)—is wholly implausible. To begin with, there was nothing in the cases which recognized the third exception or, more to the point, in those which denied postpetition interest to tax collectors and other holders of nonconsensual liens, that even remotely related to the pre-1966 law with respect to notice of federal tax liens. Furthermore, and most significantly, whereas the 1966 change dealt only with *federal tax* liens, the proposed change in the bankruptcy law would aid not only the federal tax collectors but also state revenue authorities and private nonconsensual lienholders. See p. 18, *supra*. On the other side of the balance, the unsecured creditors who are protected by the pre-Code law (see p. 15, *supra*), benefit rarely, if ever, from the change-in-notice requirements effectuated by the 1966 Act. The major beneficiaries of those changes are prospective lenders who, having notice of federal tax liens, choose *not* to extend credit, or to assure themselves that the borrower has sufficient assets so that the loan can be sure despite the federal tax lien.

The two additional points made at U.S. Br. 28-29 likewise assert equitable considerations which affect only the federal government, and therefore could not possibly justify a construction of § 506(b) granting postpetition interest to oversecured nonconsensual creditors generally. Moreover, neither point has substance even as to the federal government.

The concern that "the government is, in important respects, less able to protect its position than a private

creditor" (*id.* 28, citing H.R. Rep. 95-595 at 189-193), was dealt with by Congress *directly* in provisions of the new Code which deal with the priority nondischargeability of income taxes, as the House Report there explains.

Finally, the taxing authorities could have expressed *to Congress* their disagreement with the pre-1978 decisions which allowed interest to private creditors but not to the government. U.S. Br. 29. But since they did not do so, it is unreasonable to suppose that Congress would have reversed the prior law to favor nonconsensual lienholders on its own initiative. See pp. 19-20, *supra*. Under these circumstances, common sense reinforces the *Midlantic-Kelly* rule that an intent to change the law will not be attributed to Congress unless "it makes that intent specific." 474 U.S. at 501.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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